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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MICHELLE SHULTZ, individually and on behalf of others similarly situated,

Plaintiff,

v.

TTAC PUBLISHING, LLC,

Defendant.

Case No. 4:20-cv-4375-HSG

DEFENDANT'S NOTICE OF MOTION AND MOTION TO STAY

Date: Jan. 7. 2021
Time: 2:00 p.m.
Ctrm: 2, 4th Floor

Honorable Haywood S. Gilliam, Jr.

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT on January 7, 2020 at 2:00 p.m. or as soon thereafter as counsel may be heard by the above-captioned Court, located at 1301 Clay Street, Oakland, CA 94612, Courtroom 2 – 4th Floor, Honorable Haywood S. Gilliam, Jr. presiding, Defendant TTAC Publishing, LLC will and hereby do move the Court for an order staying the action pending resolution of the appeal filed by TTAC regarding the Court's order denying TTAC's motion to compel arbitration.

This Motion is based on this Notice of Motion, the attached Memorandum of Points and Authorities, the Declaration of Jay T. Ramsey and exhibits thereto, filed concurrently herewith, the pleadings and papers on file herein, and upon such matters that may or must be judicially noticed, and upon such further matters as may be presented to the Court at the time of the hearing.

Dated: December 2, 2020 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Jay T. Ramsey*
JAY T. RAMSEY

Attorneys for TTAC PUBLISHING, LLC

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I. INTRODUCTION

On October 26, 2020, the Court issued an order denying Defendant TTAC Publishing, LLC's ("Defendant" or "TTAC") motion to compel arbitration (the "Order"). Dkt No. 23. By this motion, Defendant seeks an order staying further proceedings in this Court while the appeal is pending. Because TTAC can make a strong showing on the merits of its appeal, as detailed further below, in order to ensure that it does not suffer the irreparable harm of the lost benefits arbitration by continuing the litigation in the absence of a stay, the Court should stay these proceedings pending Defendant's appeal. Such a stay will further conserve valuable resources, of both the parties and the Court.

II. FACTUAL BACKGROUND

As set forth in TTAC's motion to compel arbitration, on April 13, 2018, Michelle Shultz ("Plaintiff") visited TTAC's website and purchased a digital copy of The Truth About Pet Cancer, a documentary film offered for sale to consumers by TTAC. Dkt. No. 14-1 ¶ 7. On the checkout page of the website where Plaintiff completed her purchase, she submitted certain personal identifying information, including her first and last name, mailing address, email address, and phone number. *Id.* ¶ 8. In connection with completing this purchase, Plaintiff explicitly acknowledged that she agreed to be bound by certain terms and conditions that were made available for Plaintiff's review at the time of checkout (the "Terms and Conditions"). *Id.* ¶¶ 9, 15. Among the Terms and Conditions to which Plaintiff affirmatively assented was an agreement to arbitration in which Plaintiff agreed to arbitrate all claims and disputes against TTAC. *Id.* ¶¶ 10, 12; Exhibit 1. As part of agreement to this provision, as well as a later section of the Terms and Condition, Plaintiff also agreed to, among other things, waive her right to bring claims as a representative or member or a class action. *Id.* ¶ 13-14; Dkt. No. 14-2. Owing to the parties' bargained-for agreement that Plaintiff's dispute would be adjudicated

through arbitration on an individual basis, Defendant moved to compel her claims to the appropriate arbitral forum.

On October 26, 2020, the Court issued an order denying Defendant's motion to compel arbitration (the "Order"). Dkt No. 23. On November 24, 2020, Defendant filed a timely notice of appeal of the Order. Dkt No. 26.

III. ARGUMENT

A. Applicable Legal Standard

The Ninth Circuit is in the extreme minority of circuits which otherwise automatically stay a case when an appeal is taken from a denial of a motion to compel arbitration, because those circuits hold that such an appeal divests the district court of jurisdiction. *See, e.g., McCauley v. Halliburton Energy Servs., Inc.*, 413 F.3d 1158, 1160-63 (10th Cir. 2005). In contrast, the Ninth Circuit leaves the decision of whether to issue a stay pending such an appeal to the discretion of the district court, guided by sound legal principles. *See Mohamed v. Uber Technologies, et al.*, 115 F.Supp.3d 1024, 1027 (N.D. Cal. 2015) (*citing Nken v. Holder*, 556 U.S. 418, 433-34 (2009)). In determining whether a stay should issue, courts should consider four factors:

> (1) Whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the application will be irreparable injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) whether the public interest favors a stay.

Leiva-Perez v. Holder, 640 F.3d 962, 964 (9th Cir. 2011) *(citing Nken*, 556 U.S. at 434).

These factors "are considered on a continuum." For example, where a showing that the appeal raises serious legal issues, rather than a Defendant demonstrating a strong showing on the merits, then the balance of hardships should tilt in its favor in order to justify a stay. *Morse v. Servicemaster Global Holdings,*

Inc., 2013 WL 123610, *2 (N.D. Cal. Jan. 8, 2013) (*citing Leiva-Perez*, 640 F.3d at 967).

B. The Court Should Stay Litigation Pending the Ninth Circuit's Resolution of Defendant's Appeal Regarding Arbitration

1. There is a Likelihood of Defendant's Success on Appeal

In order to satisfy the first *Nken* factor, the moving party need not show that "success on appeal is more likely than not," *Guifu Li et al. v. A Perfect Franchise, Inc.*, 2011 WL 2293221, *3 (N.D. Cal. June 8, 2011), if it can make a "strong showing" on the merits, *Leiva-Perez*, 640 F.3d at 964. Here, notwithstanding this Court's conclusions in the Order, Defendant has a likelihood of success on appeal.

As an initial matter, the Order disregarded the arbitration agreement's delegation clause and thus improperly reached the issue of arbitrability. The Order relied upon a misreading of the briefing papers by starting with the premise that "Plaintiff challenges whether there is an agreement between the parties at all." *Order* p. 5. While Plaintiff's counsel argued through an opposition memorandum of points and authorities that Defendant's website does not provide a reasonable user sufficient notice to form an enforceable agreement, Plaintiff herself never disputed Defendant's contention that she agreed to the terms and conditions irrespective of whether the "reasonable user" had sufficient notice of such terms. When taken for the implicit admission that it was, Plaintiff's silence as to *her* individual agreement to the terms and conditions mandated that the arbitration agreement's delegation clause be enforced such that the arbitrator, not the Court, decides the issue of arbitrability. For this reason alone, there exists a likelihood of success on appeal.

Defendant also has a likelihood of success on the merits of the issue of whether its website provides sufficient notice to a reasonable user of the terms and conditions. The notice provided on TTAC's website was at least as conspicuous, if not more so, than similar browsewrap agreements enforced by California courts

applying the holding of *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014).

The Order cites reasons for why this Court believed that the website forces a user to "parse through confusing or distracting content and advertisements" to find the terms and subsequently concluded that sufficient notice was not provided to a reasonable user. Each such reference is either misplaced or runs contrary to prior cases in which similar webpages, with equally as conspicuous (or even more obscured disclosures than Defendant's) were deemed to provide sufficient notice to users. The sum total of this resulted in TTAC's website being subjected to disparate treatment to similar websites, deemed to fall short of a gold standard for conspicuousness when all that was required is sufficient notice to the reasonable user of the website.

For example, the Order diminishes the conspicuousness of the terms and conditions hyperlink by noting that it is only in the typical blue font color, rather than also being underlined, in all caps, or otherwise set off from the page, being included in an acknowledgment "I agree to the terms and conditions" that is in text that is smaller than the call to action "Complete Purchase" button immediately below it, and on a page, notwithstanding such information being located on the far side of the page and not within the line of sight of both the terms and condition hyperlink and "Complete Purchase." In so doing, the Order seemingly seeks to impose upon the website a standard of perfection, while the law requires only adequacy or sufficiency. That the website did in fact provide sufficient notice is demonstrated by previous cases in this Circuit in which enforceable contracts have been found, under California law, on websites in which (i) the terms and conditions hyperlink is not bolded or underlined, *Crawford v. Beachbody, LLC*, 2014 WL 6606563, *3 (S.D. Cal. Nov. 5, 2014) (Ramsey Decl. Ex. 1); (ii) the terms and conditions hyperlink is located at the bottom of the page rather than immediately adjacent to the call to action button, *Nevarez v. Forty Niners Football Co., LLC*,

2017 WL 3492110, *2 (N.D. Cal. Aug. 15, 2017) (website image in decision, available on Westlaw); *see also Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014) (Ramsey Decl. Ex. 2); and/or (iii) the terms and conditions hyperlink was not only located at the bottom of a screen and well below the webpage's call to action button, but also located next to and below advertisements or other promotions on the screen. *Rodriguez v. Experian Servs. Corp.*, 2015 WL 12656919, *2 (C.D. Cal. Oct. 5, 2015) (Ramsey Decl. Ex. 3.)

TTAC's website, and its notice of the terms and conditions hyperlink, matched or exceeded each of the foregoing webpages which were deemed acceptable. The hyperlink was not buried off screen that would have required a user to scroll in order to ever see it; it was located directly above the only button on the page that a user can click to continue and for which there is no dispute that Plaintiff clicked. The hyperlink is not obscured among other hyperlinks on the page; it is *the only* hyperlink on the page. That the hyperlink is not italicized or underlined does not make it inconspicuous. The reasonable user of a website in 2020 understands that terms which are highlighted in blue are a clickable hyperlink. Its location immediately above a button which Plaintiff does not dispute having clicked and immediately below the payment fields which Plaintiff does not dispute having affirmatively populated with the necessary information to complete the purchase that she does not dispute making only buttresses the point that one cannot avoid spotting the terms and conditions hyperlink and recognizing it for what it is. To the extent that the Court believed that the video embedded onto the top right corner of the page automatically played and served as a distraction from the hyperlink well below it, that is mistaken. As the screenshot provided in Defendant's Motion demonstrated, the video has a clickable play button indicating that it is not playing; this is in contrast to where the pause button is displayed which would otherwise indicate that the video was playing. The reasonable user had constructive notice of

the terms and conditions, and Defendant has a likelihood of success on these grounds on appeal.

Alternatively, Defendant can satisfy this first prong by showing that its appeal raises "serious legal questions," even if it has only a minimal chance of prevailing on the question. *See Golden Gate Rest. Ass'n v. City and Cnty. Of S.F.*, 512 F.3d 1112, 1115-16 (9th Cir. 2008). An unworkable level of subjectivity has developed on the issue of whether an agreement is enforceable when formed on a website which, like Defendant's, otherwise provides users with conspicuous notice and access to the terms and conditions to which s/he assents following the standard enunciated by *Nguyen* that "where a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice." *Nguyen*, 763 F.3d at 1178-1179. The moving target of enforceability is highlighted by the disparate results laid bare by the Order when compared to the above cases. Defendant anticipates that its appeal of the Order is likely to elicit some measure of clarification from the Ninth Circuit as to what exactly qualifies as the "more" that *Nguyen* envisioned for district courts to find acceptable online broweswrap agreements.

2. Defendant will be Irreparably Harmed Absent a Stay

If the Court elects not to grant a stay pending Defendant's appeal, TTAC will suffer irreparable harm. If this matter proceeds in the interim, it will suffer the costs of litigation, the vast amount of which will be incurred by submitting to voluminous, likely unnecessary discovery, particularly substantial discovery of electronically stored information. Defendant, like so many defendants in putative TCPA class action lawsuits, bear the far heavier burden of resource expenditure than plaintiffs as a consequence of the discovery obligations given the nature of the claims.

Defendant will thus forever lose the advantages of arbitration – speed and economy – if the case proceeds pending the appeal of this Court's refusal to compel arbitration.

The Ninth Circuit has determined that the loss of the advantages of arbitration is a harm that is both serious and irreparable. *See Alascom, Inc. v. ITT North Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984). This harm is compounded further by the fact that Plaintiff is anticipated to take broad class-related discovery on the putative nationwide class for which she seeks to represent, notwithstanding the fact that Defendant is appealing the enforceability of an arbitration agreement pursuant to which the parties agreed that Plaintiff is only permitted to pursue individual claims, not claims brought on a representative basis. Thus, not only does TTAC face the risk of engaging in discovery which might not otherwise be permitted pursuant to the rules of arbitration that the parties agreed would govern their dispute, but it also faces the risk of being compelled to produce disclosures far beyond the scope of what the parties agreed is permissible in a dispute between them with respect to the claims Plaintiff can assert.

In recognition of the Ninth Circuit's acknowledgment that irreparable harm will be caused by not staying litigation when the issue of arbitration is appealed, courts routinely highlight the irrevocable loss of the chance to reap the advantages of a bargained-for arbitration as sufficient harm justifying a stay pending appeal of a district court's order declining to enforce a party's own arbitration agreement. *See e.g., Ward v. Estate of Goosen,* 2014 WL 7273911, *3 (N.D. Cal. Dec, 2014) ("[A]rbitration is unique" in that "monetary expenses incurred in litigation" generally constitute irreparable harm."); *Echevarria v. Aerotek, Inc.*, *Zaborowski v. MHN Government Services, Inc.*, 2013 WL 1832638 (N.D. Cal. May 1, 2013) (issuing stay because the "substantial costs" of defending suit in court "would affect the cost-limiting purpose of arbitration"); *Murphy v. DIRECTV, Inc.*, 2008 WL 8608808, *2 (C.D. Cal. July 1, 2008) (issuing stay because "costs of litigation in the

face of a denied motion to compel arbitration will generally constitute irreparable harm").

To the extent that Plaintiff attempts to argue that this injury is not irreparable because Defendant appeals an issue that is not determinative of the merit of her claims, she misses the point. Defendant's appeal is not merely determinative of a procedural issue – where her claim is litigated – but whether she can bring claims on a representative basis at all given the arbitration agreement's class action waiver provision. The inevitable injury to Defendant in having to defend against claims that the Ninth Circuit may ultimately conclude Plaintiff has no right to pursue is self-evident, and it is irreparable. This Court should issue a stay accordingly.

3. The Third and Fourth Factors Also Weigh in Favor of a Stay

Plaintiffs will suffer no substantial harm should a stay issue pending Defendant's appeal. Notwithstanding her request for injunctive relief, Plaintiff does not and cannot allege that she continues to be contacted by or on behalf of Defendant. The relationship between the parties has ended. Plaintiff chiefly seeks to recover statutory damages for alleged violations of the TCPA, and any delay in seeking statutory damages, without more, does not constitute harm or damage to a plaintiff. *See Errington v. Time Warner Cable Inc.*, 2016 WL 2930696, *4 (C.D. Cal. May 18, 2016). Any harm to Plaintiff in terms of delay in a possible recovery of monetary damages would not be irreparable; in fact, in the event that she prevails the delay can and would be compensated to her through prejudgment interest, as permitted by applicable law. Moreover, Plaintiff's ability to pursue discovery in the event that Defendant's appeal is unsuccessful would not be harmed, as Defendant has instituted a litigation hold for potentially relevant records and issued a document preservation notice to the relevant non-party. In short, Plaintiff will suffer no harm were a stay to issue pending Defendant's appeal.

Finally, the public interest clearly favors a stay. Policies underlying arbitration law stress the importance of judicial efficiency and economy. Thus, it is

little surprise that courts entertaining applications to stay pending appeals of a denial of motions to compel arbitration routinely stress that issuing such stays avoids wasting judicial resources while keeping with the federal policy favoring arbitration. *See e.g.*, *AG Edward & Sons, Inc. v. McCullough*, 967 F.2d 1401, 1404 n. 2 (9th Cir. 1992); *Sample v. Brookdale Senior Living Communities, Inc.*, 2012 WL 195175, *2 (W.D. Wash. Jan 23, 2012) ("Disputes about whether or not parties must submit to arbitration take place against a backdrop of policies encouraging arbitration and the preservation and integrity of judicial resources. Here, continuing to litigate in this Court during the pendency of the appeal would undermine both policies because of the risk of redundant or inconsistent actions. The public interest weighs in favor of a stay."); *Laster v. T-Mobile USA, Inc.*, 2008 WL 5377635, *3 (S.D. Cal. Nov. 4, 2008) ("stay serves public's interest by promoting the strong federal policy encouraging arbitration as a prompt, economical and adequate method of dispute resolution.") (internal quotations and citations omitted).

IV. CONCLUSION

TTAC respectfully requests that the Court stay this case pending the Ninth Circuit's resolution of its appeal.

Dated: December 2, 2020 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Jay T. Ramsey*
JAY T. RAMSEY

Attorneys for TTAC PUBLISHING, LLC